NO. 11583

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

BENJAMIN N. WILHITE,
Appellee.

ANSWERING BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States, for the District of Oregon.

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Upon Appeal from the District Court of the United States, for the District of Oregon.

Appellant's counsel in their opening brief bluntly pose the following question:

> "Can a ship's carpenter, who, in broad daylight, without looking where he is going, bumps his head on a fog buoy suspended horizontally under the gun platform of a ship, leaving nearly 6 feet of headroom, collect $2500 damages?"

We do not believe appellant's case can be fairly stated so simply. We believe the question disclosed by the record is more fairly stated as follows:

> "Can an employer of seamen so impair the overhead clearance of a proper passageway used by members of the ship's crew, without responding in damages for injuries sustained by a crew member using such passageway without notice of the impaired clearance?"

We believe the evidence fairly poses such a question and that under the authorities such question must be answered in the negative. We further believe that the amount allowed by the court under the circumstances disclosed by the evidence in this case was a very modest award.

Consideration of the question posed by the appellant and the question posed by appellee require a better and fairer understanding of the facts than is reflected in appellant's brief. The statement of facts set forth by the appellant's counsel in their opening brief correctly reflects much of the testimony. Care has been used to omit testimony tending to disclose chargeable negligence on the part of the employer. Corresponding diligence has been used to set forth all the facts from which an inference could be drawn that the libelant in the circumstances of his injury was not using due care. No useful purpose would be served by repeating or even summarizing the facts disclosed by the evidence. The court will read the entire record. We shall deal with the specifications of error in the order in which they appear in appellant's brief.

FIRST SPECIFICATION OF ERROR

Under this specification appellant argues that the trial court erred in holding the respondent liable at all in damages. We are told by appellant's counsel that this specification does not require much argument. Then follows this glaring and inexcusable misstatement of the evidence:

> "The man was not even passing through a passageway. He was passing across an open deck." (App. Brief p. 7).

The witness Thomas Gill, under whose direction the work was being done at the time of libelant's injury, gave the following testimony:

> "Q. (By Mr. Tanner) Now, I will ask you whether or not the passageway that he was using in response to the order that he had received was a proper passageway for a member of the crew to use?
> A. It was, yes, sir." (Ap. 41).

We do not believe we could improve upon the clarity of the language used by the trial court in rejecting a similar argument that was made at the time of the trial. We quote the argument advanced by one of appellant's counsel during the trial and the reply which the court made to it:

> "(By Mr. Erskine B. Wood) So the facts are simple and they don't require any extended argument. Here was a beam hung under there from which there was plenty of room to walk under *if you ducked your head,* and it is admitted by counsel that there are many places all over a ship where you have to crawl through passageways, all the

watertight doors on ships—(Italics ours)

"The Court: Well, that is true, counsel, but those kind of places the crew usually knows that they are narrow or unobstructed places and anticipate that they will be required to crawl or in some way make themselves smaller, but I believe the testimony here is apparently without conflict that these beams or fog buoys were lashed under the gun deck in such a way that it wouldn't permit an upright passage by a workman under the beams. In other words, it was a place where it was not known there was a need to bend or make yourself small in any way in getting under. Now, the one beam, at least, apparently from the testimony, was low. It was lowered in such a way as to obstruct the headroom, unknown to the libelant." (Ap. 111-112).

It is argued by appellant's counsel in support of this specification of error that the evidence does not show that the beam under which the libelant attempted to pass had been improperly lashed. With reference to this beam the witness Gill testified:

"Q. (By Mr. Tanner) When it was in proper position I will ask you whether or not there was adequate clearance for men to use the companion way in their quarters on the afterdeck of the vessel?

A. When it was properly secured, it was." (Ap. 39).

Then, further in his testimony, referring to the same beam the same witness said:

"A. It had been lowered about six or eight inches, so they could attach some lines to it, to paint them.

Q. Now whenever they had occasion to lower an appliance or a device of that kind under those circumstances, what are the usual and ordinary precautions that are taken, if any?

A. You usually put an obstruction there or you tie a line across so that a man can see that there is something to watch for when he is going through that area; either that or you have a man there to stand to watch and warn people.

Q. Was there any warning given to Mr. Wilhite?

A. No, sir, there wasn't. I didn't know that they had lowered the fog buoys or I would have had a line there myself. That is one of my jobs.

Q. Do you know who lowered it?

A. No, I don't know who done it, but I had sent two men back there to paint the life buoys and they had lowered it down so that they could tie the rings up with it.

Q. And there was no warning any place?

A. No, sir, there wasn't." (Ap. 40-41).

The fact that libelant encountered the beam with his head seems conclusive that the overhead clearance had been impaired.

Appellant's counsel says as to these facts:

> "It was much as if a man walking along the street should bump into a lightpole on the curb and then sue for damages." (App. Brief p. 7).

We believe that the facts more nearly resemble cases dealing with traps for which an owner of land had been made liable even to a trespasser, when injury results. It seems to us that a person would have a better opportunity under the circumstances disclosed by the evidence in this case to protect himself against a wire stretched across his passageway at ankle height than he would from an overhead obstruction of a few inches.

The libelant invokes, as he has the legal right to do, the protection of the Federal Employers' Liability Act which makes the shipowner liable for injury to its em-

ployees resulting "in whole or in part from the negligence of any of the officers, agents or employees * * * or by reason of any defect or insufficiency due to its negligence in its * * * appliances, machinery * * * or other equipment." 45 *U.S.C.A.* Sec. 51.

Mahnich v. Southern S. S. Co., 321 U.S. 96; 64 S. Ct. 455.

46 *U.S.C.A.* Sec. 688.

Seas Shipping Co. v. Sieracki, 328 U.S. 85; 66 S. Ct. 872.

Carlisle Packing Co. v. Sandanger, 259 U.S. 255; 42 S. Ct. 475.

SECOND SPECIFICATION OF ERROR

This specification of error deals with appellant's claim that libelant's own negligence contributed to his injury. Appellant's counsel blandly asserts at the outset of their argument that it is unnecessary to argue this specification of error. It is said that Wilhite "carelessly and stupidly blundered into this beam without looking where he was going." We see no reason why Wilhite should have anticipated his employer's negligence in lowering the beam. Had the beam not been lowered he would have had a safe passageway. The law is well settled that one need not anticipate another's negligence. As we understand these authorities, one may base his conduct upon the assumption that others have used due care. Wilhite could hardly have been expected to look or take any precautions for his own safety when he had no notice or knowledge that the overhead clearance of

the passageway had been impaired. The trial court considered this contention. When this argument was made in the court below it was disposed of clearly and concisely. We quote the following from the record:

> "Mr. Erskine B. Wood: Of course, the fog buoy would have to be lowered in order to put a lashing around the top of it to hang these life rings onto, bring them low enough.
>
> "The Court: That is true enough, counsel, and that appears obvious to us now, but whether it appeared so obvious to a workman busy at the time and expecting a free and unenhampered passageway so far as an overhead beam is concerned is doubtful." (Ap. 112).

In appellant's counsel's zeal to show contributory negligence, they completely failed to give any significance to the following testimony:

> "Q. (By Mr. Erskine B. Wood) And did you look where you were going?
>
> A. I was looking down, because there was something laying on the deck I had to step over.
>
> Q. What was it?
>
> A. I don't remember what it was. There was something laying there on the deck, right below the life rings. There was a lot of litter on the deck. They generally clean them up after they get to sea." (Ap. 67).

Considering this specification of error in another aspect, the ship was rendered unseaworthy as the result of the lowering of the beam. The shipowner owes a nondelegable duty, which is absolute and continuing, to provide workmen with a safe place in which to work. Modern authorities seem to adopt the view that a ship rendered unsafe as the result of the shipowner's negli-

gence is unseaworthy. Ancient authorities hold an employer liable for injuries resulting from unseaworthiness. Such liability is based upon humanitarian considerations quite apart from principles springing from tort or contract liability. We quote the following from the case of *Seas Shipping Co. v. Sieracki,* 328 U.S. 85; 66 S. Ct. 872, 877:

> "Derived from and shaped to meet the hazards which performing the services imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S. S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U.S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L.R.A., N.S. 1157; Carlisle Packing Co. Sandanger, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

THIRD SPECIFICATION OF ERROR

In appellant's third specification of error appellant complains of the general damages which were awarded by the court in the amount of $2500.00. Appellee was quite as disappointed as appellant. We felt at the time of trial that the evidence justified a more substantial award, and we so indicated to the trial court. (Ap. 117-118).

Wilhite described his injuries not only at the time of trial but to the doctor that examined him at appellant's request. Appellant's counsel asked Dr. Raaf concerning the symptoms of which he complained. We believe the doctor's answer disclosed a physical condition that

would warrant a much larger award. We quote the doctor's answer:

> "A. He stated that on January the 23rd, 1946, he was on a boat, raised up suddenly and hit his head on a 6 by 6 timber, fell to his knees, felt stunned, but was not unconscious. Although he had a headache he continued to work. The next day his headache persisted and he felt as if he could not walk straight. He went to Vancouver, British Columbia, was paid off the ship on the advice of a physician. His headache persisted and was so severe he stopped enroute to Portland because any jarring aggravated his condition.
>
> "He noted some variable double vision during, or since the injury, which is not constant but is present every day, but he said it would come and go during the day. He has not been able to drive his car since the injury because of the double vision, the headache, and a little dizziness. His headache is less severe, but the double vision is as marked as ever. He has continuous ringing in the ear since the accident. He has never been unconscious since the accident. He awakens at night with his head throbbing. His eyes bother him some and his vision is blurred when he reads. Since the accident the arm feels numb at night but this does not occur in the daytime." (Ap. 89-90).

Appellant's counsel sought to avoid the effect of this testimony by attempting to prove that the symptoms which the doctor described were due to other causes. The following testimony appears in the record:

> "Q. What other possible causes could be of these headaches and dizziness and things he complains of?
>
> A. I assume you mean the headaches and dizziness that he now complains of at the present time?
>
> Q. Yes.
>
> A. Well, of course, they could be due to things

like high blood pressure or anxiety or constipation or any sort of illness; any number of illnesses can cause headaches.

Q. You mentioned high blood pressure. Did you in your examination of him find out anything about his blood pressure?

A. His blood pressure at the time I saw him was 174 over 110, which is an elevated blood pressure.

Q. Would that be a possible cause of these symptoms?

A. Could be." (Ap. 92).

The foregoing testimony must be considered in the light of the previous testimony given by the doctor in which he stated that he found no objective symptoms at all which would account for Wilhite's headaches. This is what the doctor said:

"Q. And did you examine him particularly for an alleged injury to his head resulting in headaches and so forth?

A. I did.

Q. Did you find any objective symptoms at all?

A. I did not." (Ap. 89).

We believe that the conclusion which the trial court made concerning the doctor's testimony is a fair one and the only reasonable interpretation that can be placed upon it. The trial court said:

"The Court: That is true. I listened to the doctor's testimony with interest. He made an examination and he didn't say that he found anything in his examination which would justify the symptoms that the plaintiff complains of, in other words, that no other cause—he said that other things could have caused it. Then he made an examination and he didn't say there was anything that he found that he could attribute the symptoms to." (Ap. 115).

In this state of the record how can it successfully be argued that Wilhite's symptoms were due to causes independent of the injury? It is a difficult problem to determine the amount of general damages for a physical injury. Courts as well as jurors differ widely in their awards. The subject matter of amount of awards by trial judges is discussed in 3 Am. Juris., Sec. 907, at p. 474, from which we learn:

> "Findings and awards as to damages will not be disturbed on appeal unless manifestly erroneous, or so shocking to the judicial conscience, or so excessive, as clearly to show that it was the result of passion or prejudice."

Judge Rudkin, in *Luckenbach SS Co. v. Campbell,* 8 Fed. (2d) 223, had occasion to discuss an award in an admiralty case in which the trial court had allowed $5,000.00 for wrongful death, and which award was assailed on appeal. The court pointed out that after considering the evidence relating to pain and suffering, and other evidence in the case, it could not be said that the amount of recovery was excessive, "or so excessive as to justify interference by an appellate court."

In the case of *The Heranger,* 101 F. (2d) 953, 957, we find the following succinct statement for the rule, the application for which we now contend:

> "From a careful review of the record in this case we find that there is substantial evidence to support the findings of the trial judge. This court has adhered to the rule that findings and conclusions of the District Court in an admiralty case will be affirmed on appeal, unless the record discloses some plain error of fact or misapplication of some rule of law. The Mabel, 9 Cir. 61 F. 2d 537."

Libelant's injuries were painful and severe. He was taken off the ship at the request of the doctor. He was complaining of symptoms for over a year following the injuries. Captain Carlson, who had sailed with Wilhite, and who was a disinterested witness, described his condition following his injury as follows:

> "At first I wasn't aware consciously, but one thing I noticed, that he—I mentioned certain persons that both of us knew quite well and he didn't seem to remember much about them; in other words, it seemed as though his memory was a little vague and that—well, just his general appearance; he didn't seem to be alert mentally as much as he always had been before.
>
> Q. And how was he physically, with reference to his alertness and his general physical condition? What did you notice?
>
> A. Well, I had known him to be very active, in fact more active than most young fellows that I know, and I noticed that he was very sluggish, and I didn't know the reason for it at the time, and, being no doctor, I could just say that I could see something had happened, I didn't know what, but I know very well that he was a different man." (Ap. 35, 36).

Surely this evidence justifies the award of which appellant complains, and we believe that it would have justified a much larger one.

CONCLUSION

In conclusion we remind the court that the United States is a party and we are mindful of paragraph 4 of Rule 27 relating to costs. In this connection we direct the court's attention to Section 743 of Title 46 U.S.C.A.

known as the Suits in Admiralty Act. The pertinent part of this section is as follows:

> "A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction."

This case was prosecuted pursuant to Section 1291 of Title 50 U.S.C.A. the Act of March 24, 1943, sometimes referred to as Public Law 17, the pertinent provisions of which provide as follows:

> "Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act (Title 46, Sections 741-752)."

In *James Shewan & Sons Inc. v. United States,* 267 U.S. 86, 87; 45 S. Ct. 238, 239, Chief Justice Taft ordered the correction of a mandate in an action against the United States brought under the Suits in Admiralty Act, saying:

> "In accordance with this provision we *must* assess the costs of this appeal against the United States, and direct the District Court to assess also the costs of suit in that court and interest as that court shall order it in accordance with the statute." (Italics ours).

It is significant that appellant's counsel have cited no authorities whatsoever to support their position. We believe none can be found. They have misstated the evidence in an attempt to support an illogical argument. We are constrained to suggest that the appeal has delayed the proceedings on the judgment of the court below within the meaning of rule 26. We believe the judgment should be affirmed in all respects, and we further believe that we are entitled to costs and interest as provided by the Suits in Admiralty Act contrary to paragraph 4 of Rule 27 promulgated by this court.

Respectfully submitted,

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